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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-487

No. .....

UNITED STATES OF AMERICA

v.

JOHN D. FRAZIER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

John D. Frazier, your Petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on August 5, 1977.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals on August 5, 1977, in an opinion which has not yet been officially reported. The opinion is reproduced as Appendix A hereto (App. A-1 to A-11).

On August 29, 1977, the Court of Appeals denied Petitioner's petition for rehearing or in the alternative for transfer to the Court en banc. The Court's order is reproduced as Appendix B hereto (App. A-12). Thereafter, on September 12, 1977, the Court of Appeals entered its order staying its mandate until final disposition by this Court. The Court's order is reproduced as Appendix C hereto (App. A-13).

This case was previously before the Supreme Court on Petitioner's petition for writ of certiorari which was denied on January 10, 1977, — U.S. —, 97 S. Ct. 751. The Court's order is reproduced as Appendix D hereto (App. A-14).[1]

Prior thereto, this cause was decided by a panel of the United States Court of Appeals on an appeal by the government from a ruling by the District Court sustaining in part Petitioner's Motion to Suppress. The Court of Appeals reversed the District Court by an opinion entered on July 16, 1976, reported at 538 F.2d 1322. The opinion is reproduced as Appendix E hereto (App. A-15 to A-24). The District Court's order, which was not officially published, is reproduced as Appendix F hereto (App. A-25 to A-28).

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 5, 1977 (See Appendix A). A timely petition for rehearing or in the alternative for transfer to the court en banc was denied on August 29, 1977 (See Appendix B).

The jurisdiction of this Court is invoked under 28 United States Code § 1254 (1).

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[1] In the government's brief in opposition, the Solicitor General argued that the application was premature and if Petitioner were later convicted and the conviction affirmed, a petition for writ of certiorari would then be timely.

QUESTIONS PRESENTED

I

Whether the government must prove that Petitioner was involved in racketeering in order to convict him of attempted extortion in violation of Title 18, United States Code § 1951.

II

Whether the District Court correctly ruled that government agents were required to obtain a search warrant prior to installing an electronic bumper beeper on Petitioner's automobile.

III

Whether the Court of Appeals erred in holding that exigent circumstances existed which justified the failure of agents to obtain a search warrant prior to installing an electronic bumper beeper on Petitioner's automobile.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendments to Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes of the United States

Title 18, United States Code

§ 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extoration" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside

such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

§ 3731. Appeal by United States.

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

On December 2, 1975, Petitioner was arrested and charged with a violation of § 1951, Title 18, United States Code, attempted extortion. Thereafter, Petitioner duly filed a motion to suppress evidence, which is reproduced as Appendix G hereto (App. A-29 to A-30). A hearing was held on March 19, 1976, and by memorandum and order dated March 29, 1976, the Honorable James H. Meredith sustained in part and denied in part Petitioner's motion to suppress evidence (See Appendix F). The government then took an appeal from the District Court's order pursuant to § 3731, Title 18, United States Code. On July 16, 1976, the United States Court of Appeals for the Eighth Circuit reversed the District Court ruling (See Appendix E). Petitioner then filed a petition for writ of certiorari which was denied by this Court on January 10, 1977 (See Appendix D). The Solicitor General, in his brief in opposition argued that the application was premature and, if Petitioner were later convicted on the merits and the conviction affirmed, a petition for writ of certiorari would then be timely. After the petition for certiorari was denied the case was set for trial in District Court. Trial commenced on February 7, 1977.

The trial testimony pertinent to this appeal essentially is as follows. On November 24, 1975, Mr. James Clayton, a supervisor for McDonnell Douglas Corporation, received an anonymous telephone call from a person suggesting an opportunity to Clayton to earn $50,000.00. (Tr. 4-5). Clayton reported the call to the F.B.I. which immediately began an investigation. (Tr. 6). Subsequently, Clayton received similar calls, some of which were recorded. (Tr. 18, 23). On November 25, 1975, the caller described a scheme to obtain money from a wealthy, but unidentified resident of Ladue, Missouri. He told Clayton that an explosive belt was to be attached to the victim with its removal contingent upon the payment of a significant sum of

money. No arrangements were ever made for Clayton to receive his share of the money. (Tr. 42).

The F.B.I. identified the caller as John D. Frazier on November 30, 1975, when they traced his automobile license number after observing him at the Sheraton Airport Motor Inn. (Tr. 162). When Clayton was told the caller's name, Clayton stated he knew Frazier. (Tr. 15). Clayton said that Frazier was previously employed at McDonnell Douglas Corporation, that he was a retired naval officer and expert in the handling of explosives. On December 1, 1975, at approximately 2:00 p.m., Clayton was advised by Petitioner of the name and address of the intended victim, Clarence Barksdale, President of the First National Bank in St. Louis. Clayton was also told the scheme would be carried out the following morning. (Tr. 29).

On December 1, 1975, at approximately 6:30 p.m., Special Agent Warren Wyman attached an electronic bumper beeper to Petitioner's car while it was parked at the Sheraton Inn. (Tr. 55). A search warrant was not obtained prior to utilizing the device. (Tr. 61). The beeper allowed the F.B.I. to locate Petitioner's automobile by receiving the signal emitted from the beeper. (Tr. 57).

Also on December 1, 1975, the F.B.I. received the bomb belt which was to be used in the scheme by Clayton (Tr. 76, 87). After checking it out, it was determined that the bomb was a hoax. (Tr. 97).

During the course of its investigation, the F.B.I. contacted Clarence Barksdale and told him of the proposed scheme. (Tr. 47, 49). Mr. Barksdale agreed to cooperate and it was decided that an agent would be substituted for him. (Tr. 50). Agents spent the night of December 1, 1975, at the Barksdale residence and on December 2, 1975, pretended to carry out the scheme as described by Petitioner. (Tr. 47, 50, 104). No

contact was ever made by Petitioner with Mr. Barksdale or any member of his family. (Tr. 50, 51).

The scheme began by Clayton and his associate, also an F.B.I. agent, accosting Mr. Barksdale's stand-in as he left the residence the morning of December 2, 1975. (Tr. 32, 94, 104). They went through a charade of placing a belt and chain around the stand-in. (Tr. 32, 41, 94). Petitioner was observed in the area of the Barksdale residence, but he made no contact with anyone. (Tr. 33). Later that morning, Petitioner was seen in downtown St. Louis. (Tr. 59, 71, 169). He called the Bank and told the person he spoke with, supposedly Barksdale, to get $150,000.00 together and take it to the airport parking lot where it would be picked up. (Tr. 113). One hundred five dollars was put in First National Bank bags, filled with paper, and taken to the airport parking lot. (Tr. 111, 114). Although Petitioner was seen in the vicinity of the airport earlier in the day, no attempt was made to pick up the money. (Tr. 61, 64, 73, 84, 115, 120, 163, 174).

When the agents were unable to arrest Petitioner at the airport, two agents went to procure an arrest warrant and others were ordered to arrest him as soon as he could be found. Agent Ahler went aloft in a helicopter and through the use of the bumper beeper located him in O'Fallon, Missouri. (Tr. 121). Other agents were notified of Petitioner's whereabouts, and at approximately 3:30 p.m. on December 2, 1975, he was arrested by six to ten agents as he exited a telephone booth. (Tr. 122, 164, 182). Petitioner was searched and the agents seized two business cards containing the name of Clarence Barksdale and a page from a telephone book bearing the name of James Clayton. (Tr. 125-129). The items were admitted into evidence at trial over Petitioner's objection. (Tr. 122-124, 153).

At the close of the government's case, Petitioner's Motion for Judgment of Acquittal was overruled. (Tr. 184). The defense

in this case was premised on a claim of insanity. Petitioner presented eight witnesses including himself. Since no error was claimed in regard to the insanity defense, an abbreviated transcript was prepared excluding the defense and government rebuttal testimony. At the close of all the evidence, Petitioner's Motion for Judgment of Acquittal was overruled. The jury returned a verdict of guilty.

On February 18, 1977, Petitioner was sentenced to a term of imprisonment for ten years, under § 4205(b)(2), Title 18, United States Code. Thereafter, Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit. The appeal was argued on June 14, 1977. On August 5, 1977, Petitioner's conviction was affirmed (Appendix A). Petitioner's timely petition for rehearing en banc or, in the alternative, for rehearing was overruled (Appendix B). Petitioner is currently at liberty on bond in the amount of $10,000.00, the Court of Appeals having stayed its mandate (Appendix C).

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals in reversing the District Court's ruling sustaining Petitioner's motion to suppress and affirming Petitioner's conviction and sentence.

REASONS FOR GRANTING THE WRIT

Two basic issues are presented in this petition both of which are important questions which have never been addressed by the Supreme Court. The first deals with the question of whether the government is required to offer evidence of racketeering before a person can be convicted of participating in a scheme in violation of the Hobbs Act. The second is whether attaching an electronic bumper beeper to an automobile constitutes a search and, if so, whether the government agents must have a search warrant before using such a device. In both instances, there is a split of decisions among the various circuit courts of appeal. The result is a varying degree of justice depending upon the circuit in which the acts are performed.

I

The Government Should Be Required to Prove Racketeering for a Hobbs Act Violation.

Petitioner submits that if he had performed the very same acts in either the Sixth or Ninth Circuits that he did in the Eighth Circuit, he would not be found guilty of a violation of federal law. Although the Court below declined to consider whether it believed Petitioner's acts constituted racketeering, it did recognize the division between the circuits. See, *United States v. Culbert* (9 Cir., 1977), 548 F.2d 1355 and *United States v. Yokley* (6 Cir., 1976), 542 F.2d 300. The opinion in the instant case referenced its recent decision in *United States v. Golay* (8th Cir. 6/24/77, No. 76-1166) ... F.2d . . , which reviewed the legislative history of the Hobbs Act and concluded that a broad construction, covering all acts of extortion affecting interstate commerce, was required. Petitioner submits the legislative history will not support such a conclusion.

The legislative history of the Anti-Racketeering Act of 1934, was also examined by the Sixth Circuit Court of Appeals in *United States v. Yokley*, supra, 303-304. A Senate subcommittee undertook an investigation of rackets and racketeering. A report on the bill which was eventually passed stated it was designed "to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." S. Rep. No. 1440, 73rd Cong., 2d Sess. (1934). Certainly John Frazier does not come within that classification. He is a retired Naval Lieutenant Commander of twenty-six years service, an expert in the handling and transportation of hazardous cargoes who, except for a short period during the winter months of 1975, led an exemplary life. Testimony by F.B.I. Special Agent Harlan Phillips was that this was a one-man scheme perpetrated by Petitioner (Tr. 115).

In *Yokley*, supra, the Court was faced with a situation where two men forced their way into the home of the manager of a K-Mart Department Store. One held his family hostage while the other took him to the store and emptied the safe of more than $78,000.00. In affirming dismissal of the indictment the Court relied on legislative history and the decision of this Court in *United States v. Enmons* (1973), 410 U.S. 396. It noted that the language of the Hobbs Act is extremely broad. Taken literally, (l.c. 303) "(A)ny robbery or extortion, or an attempt or conspiracy having a de minimis effect on interstate commerce, might be held to be punishable under the Act." After reviewing the history, the Court stated, l.c. 304:

> "Accordingly, although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act . . . (W)e are not persuaded that the robbery of the K-Mart Store amounted to 'racketeering' under the Act. Rather, the activity was within the exclusive criminal jurisdiction of the State of Michigan."

The Ninth Circuit has recently agreed with the Sixth Circuit that in order to come within the scope of the Hobbs Act there must be evidence of racketeering. *United States v. Culbert*, supra. The panel, in a per curiam split decision, reversed the conviction of Culbert who was charged with telephoning threats to a bank president to cause him to drop off $100,000.00 at a specified site. The Court stated:

> "The Sixth Circuit recently examined, with the utmost care, the legitimate scope of the Hobbs Act. *United States v. Yokley*, 542 F.2d 300 (6 Cir., 1976). The Court there concluded that, "although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act." Id. at 304. A review of the Act's legislative history reveals, without question, that this was the Congressional intent; thus, we adopt the reasoning of the Sixth Circuit's eminently sensible opinion. Given the applicable *de minimis* burden on interstate commerce rule (See *United States v. Shackelford*, 494 F.2d 67, 75 (9 Cir.), cert. denied, 417 U.S. 934, 94 S.Ct. 2647, 41 L.Ed.2d 237 (1974) a contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history also emphasized in *Yokley*, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty.
>
> Here, the facts do not suggest that the attempted extortion of the bank assets related, in any way, to 'racketeering.' Consequently, the offensive activity fell within the exclusive criminal jurisdiction of the state of California."

Although the government's proof may well have constituted a violation of Missouri law (Mo. Rev. Stat. § 560.130) Petitioner submits that the Hobbs Act should not be so broadly

construed. In light of this Court's more recent trend to refrain from defining as federal crimes conduct which is considered criminal by the State, Petitioner respectfully requests this Court grant his petition and define the limitations of the Hobbs Act. See, *Rewis v. United States* (1971), 401 U.S. 808, *United States v. Bass* (1971, 404 U.S. 336 and *United States v. Enmons*, supra.

II

The Use of an Electronic Beeper Is a Search.

The issue of whether the installation of an electronic bumper beeper by law enforcement officials is a search within the ambit of the Fourth Amendment has been characterized by various courts as a recurring question of exceptional importance. See, dissenting opinion of Judge Ainsworth, *United States v. Holmes* (5 Cir. en banc), 537 F.2d 227, 228, and concurring opinion of Judge Ross, *United States v. Frazier* (8 Cir., 1976), 538 F.2d 1322. The question has not heretofore been decided by the Supreme Court. Three appellate courts have now ruled on the issue and there is a split among the circuits. The Fifth Circuit in *United States v. Holmes*, supra, by an evenly divided en banc court, affirmed its holding at 521 F.2d 859, that the installation of the beeper device without a warrant is a search in violation of the Fourth Amendment. The Ninth Circuit recently held to the contrary in *United States v. Hufford* (9 Cir., 1976), 539 F.2d 32, which reversed the prior holding in favor of the defendant in *United States v. Martyniuk* (D. Ore., 1975), 395 F.Supp. 42. The Eighth Circuit in *United States v. Frazier*, supra, also reversed a District Court ruling in favor of the defendant and held that even if the installation of the beeper was a search, it was justified by probable cause and exigent circumstances. Judge Ross, concurring, stated he would hold the use of the beeper was not a search. Petitioner preserved

this issue by an appropriate objection at trial and re-raised the issue on appeal. The Eighth Circuit refused to review its prior position. District Courts in other circuits have also divided on the issue. Cf. *United States v. Carpenter* (D.C. Mass., 1975), 403 F.Supp. 361, and *United States v. Bobisink* (D.C. Mass., 1976), 415 F.Supp. 1334.

Initially it is important to understand what a bumper beeper is and what use of it is made by law enforcement agencies. The Court in *Frazier*, supra, explained that (l.c. footnote 2):

> The "bumper beeper" (is) a battery-operated device, (which) emits periodic signals which can be picked up on a radio frequency. These signals can establish the approximate location of the object to which the beeper is attached by providing a line of position, to the left or to the right, between the transmitter and the intercepting equipment.

Its primary use, as Agent Wyman testified, is for locating as opposed to following. Therefore, the government's argument that the use of the beeper is not a search because it monitors unprotected, non-private movements of an automobile, is fallacious. The fact that agents could have visually followed petitioner in his automobile is of no moment. As stated in *Katz v. United States*, 389 U.S. 347, 352, "But what he sought to exclude when he entered the booth was not the intruding eye —it was the uninvited ear." The Court in *Martyniuk*, supra, which was later reversed, explained this distinction by stating (l.c. 44):

> However, the uninvited shadower and the uninvited ear are not entirely discrete phenomena. The beeper does not monitor conversation. It does monitor movement and location, both of which may be decidedly private.

Petitioner does not complain that he could have been visually followed, but he does complain when his privacy is breached

by a device that calls out to specially equipped persons, "Here I am, Here I am."

The courts below which have held that the use of the beeper does not constitute a search all rely on the decision in *Cardwell v. Lewis*, 417 U.S. 583, 590, wherein the Court stated that, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." However, the Court continued (l.c. 591):

> This is not to say that no part of the interior of an automobile has Fourth Amendment protection; *the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion.* But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry. (emphasis added)

The Court thereafter stressed that nothing was seized from the interior of the vehicle.

In the instant case petitioner was located only after an agent went aloft in a helicopter with a device equipped to receive the signal from the bumper beeper on petitioner's automobile. He was arrested as he exited a telephone booth. The evidence which was seized and ordered suppressed by the trial court was found on petitioner's person. Certainly this is not akin to taking paint scrapings from the exterior of an automobile.

The question of probable cause to justify the installation of the beeper has never been disputed by petitioner. What has been disputed is whether in the final analysis, the decision to intrude on one's right to privacy should be made by the agents working on a case or an impartial judge. As stated in *Katz v. United States*, supra (l.c. 357):

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing

> probable cause," Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citzen and the police * * *." Wong Sun v. United States, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed. 2d 441. "Over and again this Court has emphasized that the mandate of the (Fourth Amendment) requires adherence to judicial processes," United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Petitioner does not believe the evidence in the instant case supports any exceptions to the warrant requirement.

Petitioner respectfully suggests that the panel decision in *Holmes*, supra, presented a sound, well-reasoned opinion which logically applies the Fourth Amendment protection to the use of the electronic device without prior court approval. As the Court framed the issue (l.c. 865-866):

> The real question, then, in cases of this type and the proper focal point for inquiry is whether the government, in searching out information not otherwise available, invades an individual's "right of personal security, personal liberty, and private property," *Boyd v. United States*, 1886, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751, and violates "the privacy upon which he justifiably relied." *Katz*, supra, 389 U.S. at 353, 88 S.Ct. at 512, 19 L.Ed. 2d at 583. By this approach, courts are able to distinguish visual surveillance from electronic surveillance, eavesdropping from wiretapping, a plain view from a breaking and entering.

> No rational basis occurs to us for distinguishing the violation of the expectation of privacy involved in the installation of a "beeper" on a car, in order to trace its movement, from the placing of a tap on the outside of a teelphone booth in order to overhear and record conversations, *Katz*, supra. . . .
>
> A person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be "alone" in his car when he enters it and drives away.

Because of the conflict which exists among the circuits and because of the importance of this issue in the administration of law enforcement, we respectfully suggest that certiorari should be granted as to this Question.

III

Lack of Exigent Circumstances

The Court of Appeals in the first *Frazier* decision based its finding of exigent circumstances on the need to insure the safety of Clarence Barksdale, the concomitant requirement for constant surveillance of petitioner, and the limited time frame within which the FBI agents were operating. However, a review of the transcript in this case makes it clear that the government agents were not faced with such exigent circumstances that they could ignore the warrant requirements of the Fourth Amendment. Nor did the District Court in its opinion find that there were exigent circumstances.

On November 24, 1975, the FBI was informed by James Clayton that a proposal was made to him whereby he could

make a large amount of money. The following day, November 25, 1975, they learned everything about the scheme except the name of the intended victim, and the day it was to take place. On November 30, 1975, through a surveillance at the Sheraton Airport Motor Inn, petitioner was identified as to his name and address. The FBI also knew that petitioner was to talk to Clayton the following day. At approximately 2:00 p.m. on December 1, 1975, Clayton was told the name and address of the intended victim. He was also told to call petitioner at 6:30 p.m. at the Sheraton Airport Motor Inn phone number. It was during the 6:30 p.m. telephone call that Agent Wyman placed the bumper beeper on petitioner's automobile.

At the time the decision was reached to install the beeper, and certainly at the time of the actual installation, there was never any danger to Mr. Barksdale. The FBI and local authorities were providing complete protection for Mr. Barksdale. They were stationed at his house and an agent was substituted for Mr. Barksdale on the day of the alleged extortion attempt. Furthermore, the person who was acting as petitioner's accomplice (Clayton) was actually working with the FBI and Clayton's assistant was an FBI agent. Also, the plan was that the accomplice was to pick up the "explosive belt" and with his helper accost Mr. Barksdale. Petitioner was not going to have direct contact with him until time to pick up the money. Long before then, the agents established that the "explosive belt" was in fact a harmless fake. Petitioner submits that the installation of the beeper had no relationship to the safety of Mr. Barksdale, all necessary steps having either already been planned or taken by the authorities.

The beeper was not installed to provide a constant surveillance of petitioner as suggested by the Appellate Court. Agent Wyman testified on direct examination (Tr 4-5):

Q. Does it also allow you to follow the object if it should move?

A. Following the object is very difficult because you—the vehicle is moving and you have no idea if it is moving parallel to you or running in the same direction. It is a locating device as opposed to a tracking, to a following device.

Q. So the primary object is location?

A. Yes, sir.

Clearly, the beeper was not installed for surveillance purposes. It was installed, and in fact used, to determine location when means of surveillance were unsuccessful. This does not contribute to a finding of exigent circumstances.

The government argued that it was not physically possible under the facts to obtain a warrant in time to attach the bumper beeper at 6:30 p.m. on December 1, 1975. This theory simply cannot be supported and an examination of the facts shows its fallacy.

One day after the FBI first learned of the call to Clayton, they learned the full details of the scheme. Petitioner submits that at that time they had sufficient information with which to approach a Magistrate for a warrant to use a bumper beeper. It was not necessary to know petitioner's name at that time. Even if the Court believes that sufficient information was not available on November 25, between then and November 30 the FBI compiled adequate data to support a warrant application. They learned that telephone calls to Clayton were being made from the Sheraton Airport Motor Inn, and petitioner was observed making the calls. In fact, it was during a surveillance on one of these calls on November 30 that petitioner'es name and address were established. Certainly, at the very least, the agents had all day on December 1 to obtain the necessary warrant.

The evidence does not show that a Judge or Magistrate was unavailable to consider a warrant application nor was any attempt made to contact a judicial officer. The fact that a warrant could not have been served is not material. They are not served in advance in wiretap-pen register cases or in the bumper beeper cases where warrants are obtained.

The Court of Appeals cited *Warden v. Hayden*, 387 U.S. 294, for the proposition that exigent circumstances justified the limited intrusion in this case. However, petitioner disputes that the use of a bumper beeper is a "limited intrusion". Petitioner submits that a significant constitutional right—the right to privacy —was violated. The Court in *Warden*, supra, recognized (l.c. 304), ". . . the principal object of the Fourth Amendment is the protection of privacy . . .". Petitioner urges that such a significant right should not be violated without the intervention of a detached judicial officer. Because we believe the Appellate Court to have erred on this crucial point, we request that certiorari be granted.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 77-1195

United States of America, Appellee,

v.

John D. Frazier, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: June 14, 1977

Filed: August 5, 1977

Before LAY and ROSS, Circuit Judges, and MILLER, Judge.*

ROSS, Circuit Judge.

Defendant-appellant John D. Frazier (herein either defendant or Frazier) was convicted and sentenced in district court on a one count indictment for attempted extortion of bank assets in violation of the Hobbs Act, 18 U.S.C. § 1951. For the reasons stated herein, we affirm.

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* JACK R. MILLER, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

So far as they are material to this appeal, the facts may be briefly stated.[1] Through a series of telephone calls defendant proposed to one James Clayton a scheme to obtain money from the First National Bank in St. Louis, Missouri, through its president Clarence Barksdale. The plan called for Clayton to attach to the person of Barksdale what appeared to be an explosive belt, safe removal of the belt being contingent upon payment of a substantial sum of money. The belt would be chained to Barksdale, who would also be given a walkie-talkie so the defendant could monitor his movements.

After receiving the first telephone call from the defendant on November 24, 1975, Clayton contacted the FBI, which immediately began an investigation. Clayton agreed to cooperate with the FBI by feigning compliance with the requests of the defendant. On December 1, 1975, the explosive belt, which had been made by defendant sometime prior, was delivered to Clayton with instructions that the scheme was to be carried out the following morning. With the aid of Clayton, and using an FBI agent as a stand-in for Barksdale, the plot was acted out. Clayton attached the belt to the person of the FBI agent as he left the Barksdale residence on the morning of December 2d. Later that morning the defendant telephoned Barksdale's office at the bank. This call was received by another FBI agent representing himself to be Barksdale. The defendant gave instructions to take $150,000 to the parking lot of Lambert International Airport. One hundred five dollars in currency was placed at the top of bank bags stuffed with paper and taken to the designated location.

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[1] This case was previously before this court on the government's appeal from the district court's order sustaining defendant's motion to suppress the introduction of certain evidence obtained as a result of attaching an electronic tracking device to defendant's automobile. The facts are more fully set out in that opinion, reported at *United States v. Frazier*, 538 F.2d 1322 (8th Cir. 1976), *cert. denied*, — U.S. — (1977).

Although the agents planned to arrest Frazier at the airport when he came to pick up the money, no pickup attempt was ever made. Two agents then sought to procure an arrest warrant, while others were instructed to arrest Frazier wherever he might be found. From a helicopter, Frazier was located in O'Fallon, Missouri, and was arrested without a warrant as he exited a telephone booth. Frazier was then driven to his home, some ten miles distant, in one of the agent's cars. While in custody, Frazier signed two hand-written consent forms; one giving permission to search his automobile and the other to search his home. Frazier's wife also signed a form giving consent to search the home.

At trial, the court overruled defense objections to the admission of evidence seized during the search of Frazier's automobile and residence, and also denied defendant's motions for judgment of acquittal made at the close of the government's case and again at the close of all the evidence. Defendant's appeal raises essentially four issues with respect to these rulings. The first three deal with the sufficiency of the government's evidence to establish a violation of the Hobbs Act. Lastly, defendant asserts violations of his fourth amendment rights.

I

Failure to Prove Racketeering

Defendant contends at the outset that his activities do not fall within the perimeters of the Hobbs Act, urging that the Act applies only to "racketeering" and that his scheme did not amount to a racket.[2] This position has found some support in other circuits. *See United States v. Culbert*, 548 F.2d 1355, 1357 (9th

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[2] Because we disagree with defendant's interpretation of the scope of the Hobbs Act, we decline to consider whether his activities would otherwise amount to "racketeering."

Cir. 1977); *United States v. Yokley*, 542 F.2d 300, 304 (6th Cir. 1976). However, this court has consistently maintained that the Hobbs Act means what it says. By its terms § 1951 applies to:

> (a) *Whoever in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do * * *. (Emphasis supplied.)

We are likewise unpersuaded that anything in the legislative history of the Act requires a more restrictive interpretation. In *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973), we said:

> When first proposed, the Act was described by its Congressional sponsor in the following terms:
>
> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion, extortion, whether or not the perpetrator has a union card. It covers whoever in any way or decree [sic] interferes with interstate foreign commerce by robbery or extortion.
>
> 89 Cong. Rec. 3217 (1943) (remarks of Representative Hobbs.) *See also* United States v. Green, *supra*, 246 F.2d at 160. It is our conclusion that § 1951 proscribes all forms of extortion which affect interstate commerce.

Id. at 193. In *United States v. Golay*, No. 76-1166 (8th Cir. June 24, 1977), this court was also confronted with an appeal from a conviction under the Hobbs Act for extortion of bank assets. After carefully reviewing the legislative history, we again concluded that the Act was intended to be given a broad construction to cover all acts of extortion affecting interstate commerce. *Id.*, slip op. at 3-4. Accordingly, we reject defendant's contention that his acts are beyond the reach of the statute.

II

Failure to Prove Attempt

Defendant next contends that the government's evidence failed to establish two essential elements of the crime of attempted extortion, namely (1) that Frazier attempted to obtain property from his victim, and (2) that Frazier's acts generated fear in bank president Barksdale.

Extortion is defined in the Hobbs Act, 18 U.S.C. § 1951(b),2), as follows:[3]

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

On the record before us it is clear that Frazier did not attempt to pick up the money from the airport parking lot before he was arrested. Relying on this fact, defendant points to the statutory language quoted above and argues that the government failed to prove that Frazier attempted to carry out a plan for the "obtaining of property from another."[4] Defendant thus asks this court to find that the term "obtaining of property," as used in the Hobbs Act, means "reducing to actual physical possession." We conclude that it does not carry that meaning. It

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[3] "Attempted extortion" is not separately defined in the Act.

[4] At trial, defense counsel hypothesized in closing argument that Frazier wanted to embarrass the banking community and that his scheme was complete when the money was delivered to the airport. We note, however, that the defendant's motive is irrelevant to the issue we are considering. We decline to decide here whether the evidence produced was sufficient to warrant the jury in finding that Frazier intended to pick up the money. Instead, we consider only whether proof of a scheme designed to induce another to part with money, combined with acts toward completion of the scheme, is sufficient to establish an attempted extortion.

is well settled that, under the Hobbs Act, it is not necessary to prove that the extortionist himself, either directly or indirectly, received the fruits of his extortion or any benefit therefrom. The gravamen of the offense is loss to the victim. *United States v. Jacobs*, 451 F.2d 530, 535 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States v. Provenzano*, 334 F.2d 678, 686 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964). We hold, therefore, that for purposes of the "obtaining of property" requirement, the offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property.

Defendant also asserts the insufficiency of the government's case in that fear generated in Clarence Barksdale was not the inducing cause of the bank bags being delivered to the airport. Defendant thus contends that the state of mind of the victim, i.e. fear, is an essential element of the crime alleged. We express no opinion as to whether the generation of fear in the victim is an essential element of the crime of extortion. It will suffice for present purposes to observe that Frazier was convicted, not of extortion, but of *attempted* extortion. Proof of an attempt to arouse fear is sufficient proof of an attempted extortion under the Hobbs Act. *United States v. Nadaline*, 471 F.2d 340, 343-44 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); *Carbo v. United States*, 314 F.2d 718, 741 (9th Cir. 1963), *cert. denied*, 377 U.S. 1010 (1964). In the instant case, the evidence shows that Frazier attempted to induce Clarence Barksdale to surrender bank assets, and to that end directed James Clayton to strap a bomb belt to Barksdale's body accompanied with the threat that the belt would be exploded unless his demands were met. We are satisfied that this is a sufficient showing of an attempt to arouse fear to allow the case to go to the jury.

III

Defense of Legal Impossibility

Defendant contends that even if his acts would otherwise have constituted attempted extortion, they are not punishable as such because the early intervention of the FBI and the cooperation therewith of his assumed confederate Clayton rendered it legally impossible for Frazier to accomplish his illegal aim.

A criminal attempt represents the unsuccessful prosecution of an intent to commit a crime. The defense of impossibility operates with reference to the circumstances which rendered the attempt unsuccessful. Under some circumstances, the impossibility of a defendant's successfully committing a crime eliminates the culpability of his having tried. However, the range of such exonerating circumstances is very limited and does not embrace every instance in which the defendant has undertaken a hopeless venture. To constitute a defense to an attempt prosecution the circumstances must be such as to render successful completion of the crime "legally" impossible. Thus, a distinction is drawn between what is called "legal impossibility," which acts as a defense, and mere "factual impossibility," which does not.

Factual impossibility refers to those situations in which a circumstance or condition, unknown to the defendant, renders physically impossible the consummation of his intended criminal conduct. Thus, the oft-recited example of the would-be thief who attempts to pick an empty pocket. *See United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973); *W. LaFave & A. Scott*, CRIMINAL LAW, § 60 at 440 (1972). *See also United States v. Darnell*, 545 F.2d 595, 597 (8th Cir. 1976), *cert. denied*, 97 S.Ct. 1134 (1977); *United States v. Heng Awkak Roman*, 356 F.Supp. 434, 438 (S.D. N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); *United States v. Hair*, 356 F.Supp. 339, 341-42 (D.C. 1973).

Legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime, and this is true even though the defendant believes his scheme to be criminal. *United States v. Berrigan, supra,* at 186, 188; *W. LaFave & A. Scott, supra,* at 442.

With this distinction in mind, Frazier's assertion of impossibility as a defense must be rejected. Frazier desired to obtain the bank's money from Clarence Barksdale by instilling in him the fear that he would be killed for his refusal. Had Frazier's scheme succeeded, had he brought about the desired consequences, his acts would clearly have amounted to a crime.

Frazier nonetheless insists that his acts are not punishable as an attempt because it was impossible for him to carry his scheme to fruition. This argument should not be taken to mean that the acts of the FBI in thwarting the scheme constitute legal impossibility. If so viewed the argument is plainly misplaced. Indeed, one of the primary aims of the crime of attempt is to provide a basis whereby law enforcement officers may intervene in time to prevent a completed crime.

Reduced to its bare bones, Frazier's claim amounts to the assertion that Clayton, instead of faithfully performing his part of the arrangement, informed the FBI and thereby foiled the scheme. This argument is unpersuasive. Clayton's acts present the type of circumstance, unanticipated by the defendant, which merely render the intended crime physically impossible of consummation. The infidelity of a confederate, like the emptiness of a pocket being picked, presents a simple illustration of factual impossibility.

IV

Fourth Amendment Issues

Lastly, defendant asserts error in the trial court's failure to exclude evidence obtained during the warrantless searches of his automobile and residence.[5]

On the record before us, it is clear that with respect to both his automobile and his residence, Frazier gave his consent to the questioned searches. It is also clear that a search conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973). The question presented to us, then, is whether the prosecutor discharged his burden of proving that Frazier's consent was freely and voluntarily given. *Schneckloth v. Bustamonte, supra,* at 222; *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968). We conclude that this burden was met.

At the pretrial suppression hearing, FBI agent Kubic testified that on the day of his arrest, Frazier was observed using a public telephone in front of a liquor store on Main Street in O'Fallon, Missouri, at about 3:30 p.m. As Frazier hung up the phone and moved toward his car, agent Kubic, accompanied by agent Fox, approached Frazier and stated: "FBI. Don't move." Frazier was then told that he was being placed under arrest and of the charges against him. From there Frazier was taken to an FBI vehicle a short distance away and provided with an interrogation advice of rights form. Agent Kubic further testified that Frazier expressed a co-operative attitude, saying that there must

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[5] Defendant also raises a question concerning the admissibility of articles taken from his person, claiming that the seizure of these articles was the consequence of an unlawful installation on his automobile of a "bumper beeper." This issue, however, has previously been disposed of by this court and we do not reiterate our position here. *See United States v. Frazier,* 538 F.2d 1322 (8th Cir. 1976), *cert. denied,* —U.S.— (1977).

be some mistake but that he would be glad to help clear up any misunderstanding. Agent Kubic then asked permission to search Frazier's automobile, explaining that if Frazier objected the car would not be searched. Frazier again expressed a desire to help in any way that he could. Agent Fox then prepared a handwritten consent to search form, which Frazier signed. Following the search of his car, Frazier was driven to his residence in the FBI vehicle. While enroute, Frazier gave verbal permission to have his residence searched, and following arrival at his house several minutes later, signed another handwritten consent to search form. Both consent forms were received into evidence without objection.

Agent Kubic's version of the events surrounding the questioned searches was unrebutted by the defendant. Testifying in his own behalf, Frazier stated that he could not remember signing the consent to search forms, but did identify his signature when the forms were shown to him. Frazier further testified that he could not now remember any of the other events that took place that day following his arrest. However, there is no evidence of any kind that Frazier was unaware of what he was doinng at the time of his arrest, or at the time he signed the consent forms.[6]

On the record before us we conclude that under "the totality of all the surrounding circumstances," Frazier's consent was "the

[6] Following cross-examination, the following dialogue took place between Frazier and the court:

THE COURT: Mr. Frazier, were you under the influence of drugs or alcohol or anything else?

A. No, sir, I wasn't, Your Honor.

THE COURT: Have you ever been in a mental institution any time?

A. No, sir, Your Honor.

THE COURT: You just don't remember what happened?

A. No, sir, I do not.

THE COURT: Okay.

product of an essentially free and unconstrained choice."[7] *Schneckloth v. Bustamonte, supra,* at 225, 226. The mere fact that the defendant was in custody at the time he gave his consent is insufficient, standing alone, to demonstrate the presence of official coercion. *United States v. Watson,* 423 U.S. 411, 424 (1976). Accordingly, we hold that the defendant freely and voluntarily consented to the searches of his automobile and residence, and that the searches therefore did not violate his constitutional rights.

AFFIRMED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[7] Elden Marie Frazier, defendant's wife, also signed a consent to search form with respect to defendant's house. Since we have concluded that the defendant's consent was voluntarily given, we needn't consider the validity of Mrs. Frazier's consent.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 77-1195 September Term, 1976

United States of America, Appellee,

vs.

John D. Frazier, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 29, 1977

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 77-1195 September Term, 1976

United States of America, Appellee,

vs.

John D. Frazier, Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

September 12, 1977

APPENDIX D

(Reported at 97 Sup. Ct. 751)

John D. FRAZIER, petitioner v. United States

No. 76-5447

Facts and opinion, 538 F.2d 1322.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Jan. 10, 1977. Denied.

APPENDIX E

(Reported at 538 F.2d 1322)

United States Court of Appeals
For the Eighth Circuit

No. 76-1297

United States of America, Appellant, v. John D. Frazier, Appellee.	}	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 15, 1976

Filed: July 16, 1976

Before Heaney, Ross and Stephenson, Circuit Judges.

Stephenson, Circuit Judge.

The sole issue raised in this appeal is whether the district court[1] erred in partially sustaining appellee's motion to suppress the introduction into evidence of certain articles obtained

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[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

by the government as a result of the attachment of a tracking device to appellee's automobile. We conclude that the government's action did not constitute an illegal intrusion violative of the Fourth Amendment. Accordingly, we reverse.

On November 24, 1975, Mr. James Clayton, a supervisor for McDonnell Douglas Corporation, received an anonymous telephone call from a person suggesting an undescribed opportunity for Clayton to earn $50,000. Clayton reported the call to the FBI, which immediately began an espionage investigation, since Clayton's position with McDonnell Douglas involved the handling of classified documents. Subsequently, Clayton received similar calls, which frequently were recorded by the FBI, and on November 25, 1975, the caller disclosed an extortion scheme designed to obtain money from a wealthy, but unidentified, resident of Ladue, Missouri. More specifically, an explosive belt was to be attached to the victim with the removal of the belt contingent upon the payment of a significant sum of money.

On November 30, 1975, the caller was initially identified as appellee John D. Frazier through his automobile license number when he was observed at the Sheraton Airport Motor Inn. Stephen Kettner, a special agent for the FBI, then informed Clayton of Frazier's identity, and Clayton realized for the first time that he knew the suspect. Clayton described Frazier as a retired naval officer who was an explosives expert. On December 1, 1975, at approximately 2:00 p.m., the FBI first became aware of the name and address of the intended victim of the extortion plan, Clarence Barksdale, president of the First National Bank in St. Louis. This occurred during yet another telephone call placed by Frazier to Clayton. As a result of this call, the agents also learned that the extortion attempt would be made the next day. Shortly afterward, between 4:30 and 5:00 p.m. on December 1, 1975, the various FBI agents who were involved in the investigation convened

for a conference to decide what course of action should be taken. At this conference it was concluded that a "bumper beeper" should be installed on Frazier's automobile in order to monitor his movements.[2]

On December 1, 1975, at approximately 6:30 p.m. Warren Wyman, another special agent for the FBI, attached the "bumper beeper" to Frazier's 1972 green Thunderbird while it was located in a public parking lot at the Sheraton Inn. No application for a search warrant was prepared or submitted to a magistrate prior to the utilization of the device.

During the course of the extortion attempt on December 2, 1975, the FBI agents learned that the extortion money was supposed to be delivered to the upper deck parking lot at Lambert International Airport. Although the agents planned to make an arrest when the money was to be picked up, no pickup attempt was made. Following an additional FBI conference at the airport, two of the agents proceeded to prepare an arrest warrant for Frazier while other agents were under instructions to arrest Frazier as soon as he could be found. Special Agent William Ahler conducted a search for Frazier by helicopter and through the use of the "bumper beeper" eventually located Frazier and accomplished his arrest in O'Fallon, Missouri, at approximately 3:30 p.m. on December 2, 1975.

Immediately following Frazier's arrest the agents, by search of his person, obtained from his possession two business cards containing the name and address of Clarence Barksdale and a page of the telephone book bearing the name of James Clay-

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[2] The "bumper beeper," a battery-operated device, emits periodic signals which can be picked up on a radio frequency. These signals can establish the approximate location of the object to which the beeper is attached by providing a line of position, to the left or to the right between the transmitter and the intercepting equipment.

ton.[3] Appellee was indicted on December 11, 1975, for the attempted extortion of the First National Bank in St. Louis. Prior to trial, appellee filed a motion to suppress all evidence obtained by the government as a result of the installation of the electronic tracking device. The district court after a hearing on the motion held that the evidence obtained from Frazier's automobile and residence need not be suppressed because of the voluntary consent given by appellee and his wife to the searches. The trial court found there was probable cause to arrest appellee without a warrant. However, because the arrest was expedited through the use of the "bumper beeper" attached to appellee's car, the court sustained the motion to suppress the evidence taken from appellee's personal possession without his consent. The district court concluded that the installation of the "bumper beeper" without a warrant constituted an illegal search. *See United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *rehearing en banc granted*, 525 F.2d 1364 (January 5, 1976).

In this appeal the government contends that the district court erred in suppressing the evidence taken from appellee's immediate possession. Essentially, the government asserts that the installation of the "bumper beeper" tracking device does not constitute a search within the ambit of the Fourth Amendment. *See United States v. Carpenter*, 403 F. Supp. 361, 364-65 (D. Mass. 1975). Secondarily, assuming the existence of a search, the government regards the intrusion to have been justified by either probable cause or exigent circumstances or both. In contrast, appellee contends that the use of the electronic "bumper beeper" is a search which was unreasonable under the circumstances of the instant case. *See United States v. Martyniuk*, 395 F. Supp. 42, 44-45 (D. Ore. 1975).

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[3] Appellee's automobile and residence were also searched following his arrest and some additional items were seized. The search of the automobile and the home were conducted with the appellee's and his wife's consent, and the propriety of the seizure of these additional items is not at issue in this appeal.

Whether the installation of an electronic tracking device on a motor vehicle is a search or seizure within the protection of the Fourth Amendment is a difficult question. At a minimum, the attachment of such a device, without consent or judicial authorization, is an actual trespass. Although only a limited intrusion, it is one which raises a concern that the government could plant a tracking device on a person's car and follow its movements whenever and wherever it is being driven. *See United States v. Martyniuk, supra*, 395 F. Supp. at 44-45. In contrast, it is at least questionable whether a person has a reasonable expectation of privacy with regard to his movements on public roads. *See Cardwell v. Lewis*, 417 U.S. 583, 588-92 (1974); *United States v. Carpenter, supra*, 403 F. Supp. at 364-65. *Cf. Katz v. United States*, 389 U.S. 347, 350-59 (1967). In any event, the issue need not be resolved in this appeal since we are convinced the intrusion committed in the instant case, assuming arguendo that it is a search or seizure within the ambit of the Fourth Amendment, was justified by probable cause and exigent circumstances.

The search of a motor vehicle, especially its exterior, is less intrusive and implicates a lesser expectation of privacy than otherwise applies under the general warrant requirement. *See Cardwell v. Lewis*, 417 U.S. 584, 589-91 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring). If there is probable cause, an automobile, because of its mobility, may be searched without a warrant in circumstances that would not justify a warrantless search of a house or office. *Chambers v. Maroney*, 399 U.S. 42, 48-51 (1970); *Carroll v. United States*, 267 U.S. 132, 158-59 (1925); *United States v. Brown*, No. 75-1863 (8th Cir., May 5, 1976). Probable cause exists when the facts and circumstances within a police officer's knowledge would " 'warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76

(1948), *quoting from Carroll v. United States*, 267 U.S. 132, 167(1925).

The FBI agents in the instant case were conducting an investigation of an ongoing extortion scheme. On November 25, 1975, through a telephone call placed to James Clayton, the agents learned that an unidentified person intended to place an explosive belt on a wealthy individual with its removal a condition to payment of a sum of money. Further, on November 30, 1975, the agents identified the telephone caller as John Fraizer when he was seen at the Sheraton Airport Motor Inn. It is, of course, notable that James Clayton described Fraizer as an expert with explosives. This factual basis, obtained through telephone calls placed to James Clayton, was sufficient to provide the FBI with probable cause for the installation of the tracking device on the bumper of appellee's automobile located in the public parking lot at the Sheraton Inn. *See Chambers v. Maroney, supra*, 399 U.S. at 48-51; *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968); *United States v. Powers*, 439 F.2d 373, 375-76 (4th Cir. 1971). *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971) (car parked on private property).

These same facts also suggest the existence of exigent circumstances justifying the limited intrusion conducted in the instant case. *See Warden v. Hayden*, 387 U.S. 294, 298-300 (1967); *United States v. Weaklem*, 517 F.2d 70, 72 (9th Cir. 1975); *Virgin Islands v. Gereau*, 502 F.2d 914, 928-29 (3d Cir. 1974). The tracking device was attached to appellee's automobile at approximately 6:30 p.m. on December 1, 1975. Although the FBI investigation was initiated as early as November 24, 1975, and the general nature of the extortion scheme was known on November 25, the agents did not identify Fraizer until November 30. Even then, it was suspected that Fraizer was acting in concert with other unknown individuals.

In addition, the particular nature of the extortion scheme planned in the instant case accentuates the exigency of the circumstances surrounding the FBI investigation. The extortion plan endangered the life of an unknown individual who was not identified as Clarence Barksdale until approximately 2:00 p.m. on December 1, 1975. Simultaneously, it was learned that the plan was intended to be executed on the following morning. Only a few hours later, between 4:30 and 5:00 p.m., the many FBI agents who were involved in various aspects of the investigation held a conference to decide on a course of action. It was shortly afterward, at approximately 6:30 p.m. on December 1, that the "bumper beeper" was attached. We believe the need to insure the safety of Clarence Barksdale, the concomitant requirement for constant surveillance of the appellee, and the limited time frame within which the FBI agents were operating provided sufficient exigent circumstances for the attachment of the tracking deviice in the instant case.[4] "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden, supra*, 387 U.S. at 298-99.

Appellee contends that probable cause to search the car existed for some time prior to the attachment of the "bumper beeper" and that, therefore, there were no exigent circumstances. Even assuming that probable cause previously existed, it has been recognized that the reasonableness of searching or seizing an automobile under exigent circumstances is not "foreclosed if a warrant was not obtained at the first practicable moment." *Cardwell v. Lewis, supra*, 417 U.S. at 595.

In summary, the governmental attachment of the tracking device in the instant case constituted a relatively minimal invasion of privacy which was reasonable under the circumstances.

Reversed.

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[4] Parenthetically, it should be noted that, even if the agents had obtained a search warrant, they would not have been able to serve the warrant without hindering the investigation.

ROSS, Circuit Judge, Concurring.

I agree with the result reached by Judge Stephenson, and if the issue of whether the installation of a "beeper" constitutes a search is not to be reached, I concur in what he has written. However the court, in my opinion, should squarely meet the issue: whether the installation of the tracking device was a "search" under the fourth amendment. This issue is an important and recurring one[1] and this disposition would give needed direction to the district courts, prosecutors and law enforcement authorities within the Circuit. I would hold that the use of the "beeper" was not a "search" within the meaning of the fourth amendment.

The basic inquiry in this case concerns the effect of the intrusion on the defendant's right of privacy. As Mr. Justice Blackmun has stated, "* * * insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion).

The intrusion on defendant's right of privacy in this case, if any can be said to exist, was decidedly abstract and theoretical. No invasion of the interior of the car occurred. The "beeper" did not permit the agents to "enter" the car's interior and search or seize anything therein—either intangible or tangible. The sole purpose of the "beeper" was to permit the agents to surveil the location of the defendant's automobile. The intrusion on defendant's privacy was no greater here than an intrusion created by manual, visual surveillance of the car's location, which is clearly permissible irrespective of fourth amendment considerations.

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[1] The Fifth Circuit has recently heard arguments on this issue by the court en banc. *United States v. Holmes*, 525 F.2d 1364 (5th Cir. 1976).

Two courts have held that the use of a tracking device is a "search" within the meaning of the fourth amendment. *See United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *rehearing en banc granted*, 525 F.2d 1364 (January 5, 1976; *United States v. Martyniuk*, 395 F.Supp. 42 (D. Ore. 1975. Both cases rely heavily on *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, government agents attached an electronic listening and recording device to the outside of a public telephone booth from which petitioner placed incriminating phone calls. The Court held that the eavesdropping was an invasion of the petitioner's privacy upon which he justifiably relied and, notwithstanding the absence of physical penetration into the enclosed phone booth, constituted an unreasonable "search and seizure" within the meaning of the fourth amendment.

In my view, the *Katz* case is clearly distinguishable. There, the invasion of privacy was substantial because the government was surveilling private conversations. In this case, the government used the "beeper" to surveil only the location of the defendant's automobile. *Katz* itself admonishes us that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection." *Katz v. United States, Id.*, 389 U.S. at 351.

In *Cardwell v. Lewis, supra*, 417 U.S. at 588-592, a plurality of the Court concluded that the warrantless examination of the exterior of an automobile parked in a public parking lot invaded no privacy right. The examination revealed incriminating paint scrapings and tire treads. Mr. Justice Blackmun, writing for the plurality, noted that the evidence derived from the warrantless examination of the car's exterior was "* * * not the product of a 'search' that implicates traditional considerations of the owner's privacy interest." *Id.* at 588-589.

I comprehend no meaningful difference between the invasion of the defendant's privacy in this case and the invasion in *Card-*

well. That the objective of surveilling the location of defendant's automobile was accomplished by electronic means does not enlarge any expectation of privacy. The use of an electronic device is no talisman for invoking fourth amendment protections. *United States v. Carpenter,* 403 F.Supp. 361, 364 (D. Mass. 1975).

For the reasons enumerated above, I agree that the order suppressing the evidence obtained as a result of the use of the "beeper" must be reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. John D. Frazier, Defendant.	}	No. 75-339 Cr (1)

Order

A memorandum dated this day is hereby incorporated into and made a part of this order.

It Is Hereby Ordered that the evidence seized from the defendant at the time of his arrest, the business card with the handwritten notation of the telephone number and address of Clarence Barksdale and the page from the telephone directory containing the telephone number of James Clayton, be and the same are suppressed.

It Is Further Ordered that the evidence seized as a result of the search of the automobile and the home of defendant Frazier are not suppressed.

Dated this 29th day of March, 1976.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
John D. Frazier,
Defendant.
No. 75-339 Cr (1)

Memorandum

This matter is pending on motion of the defendant to suppress evidence. The facts are that on November 30, 1975, FBI agents identified defendant Frazier as a person who was attempting to extort money from the president of the First National Bank in St. Louis by means of an explosive device. On that day, the agents also discovered where the defendant lived.

On December 1, 1975, the FBI agents learned that defendant expected money to be delivered on the following day. The agents were unaware of whether or not defendant had any accomplices. At approximately 6:30 p.m., on December 1, 1975, they installed a beeper on defendant's 1972 Ford Thunderbird, which they had identified as being the car which defendant used and was parked in his garage at his home.

On December 2, 1975, a fake money package was deposited at a certain spot in the airport parking garage in St. Louis County, Missouri, at a time requested by the defendant. Defendant was in the garage with his automobile, but did not pick up the money package. The FBI agents lost visual contact with the defendant and defendant's automobile, and through the use of the beeper, they did locate the defendant's whereabouts in O'Fallon, Missouri, about thirty miles away, by means

of a helicopter. This information was conveyed to FBI agents in automobiles on the ground and they pulled up behind defendant's automobile and observed him at a telephone booth. When defendant emerged from the telephone booth, they arrested him, and on his person they found two pieces of evidence—a business card with the handwritten notation of the telephone number and address of Clarence Barksdale, president of the First National Bank in St. Louis, and a page from a telephone book containing the telephone number of James Clayton, the citizen witness who was contacted by the defendant John D. Frazier in an effort to obtain Clayton's assistance in the extortion scheme.

After the arrest, the agents conveyed defendant Frazier in the agents' car to Frazier's home and another agent drove the defendant's automobile to defendant's home. Enroute to defendant's home, the agents advised defendant of his rights and prepared a voluntary consent to search his automobile, which defendant signed on his arrival at his home. The agents also obtained a voluntary consent from the defendant and from his wife to search the house after both defendant and his wife were advised of their rights not to have their house searched without a warrant.

The Court finds that the consent to search the defendant's automobile was voluntarily given by defendant after being fully advised of his rights even though the defendant now contends he has no recollection of what happened during the date of December 2, 1975.

The Court further finds that the defendant and his wife's consent to search the house was voluntarily given by both of them after being fully advised that the agents had no right to search the house without a warrant.

In addition, the Court finds that the FBI agents had probable cause to arrest the defendant at the time he was arrested, even though they did not have a warrant.

The question presented to the Court here is whether or not placing a beeper on defendant's car without a warrant was a search and, accordingly, illegal.

The Court finds that it was a search and that a warrant should have been obtained. *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975); *United States v. Martyniuk*, 395 F.Supp. 42 (D.Ore 1975).

Other FBI agents were waiting at defendant's home when those agents with the defendant arrived at defendant's home.

The FBI agents had learned that defendant was an electronics expert and an expert in the use of explosives. Their primary concern was to protect the safety of the bank president, Clarence Barksdale, and in order to do this they needed to keep defendant Frazier under constant surveillance and this beeper was an aid in doing so. However, the Court finds that the installation of the beeper without proper court authority constitutes a search and the arrest of the defendant was expedited by the use of the beeper. Whether or not defendant would have had the page of the telephone directory and the business card with the address and telephone number of Barksdale on his person at a later time is problematical. Accordingly, that evidence will be suppressed even though the agents had probable cause to make the arrest, since Frazier had been identified as the mover in the extortion scheme.

However, the voluntary consent to search the automobile and the voluntary consents to search the home of defendant Frazier do not require that the evidence obtained from the automobile and the evidence obtained from the home be suppressed.

Dated this 29th day of March, 1976.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX G

In the United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,

vs.

John D. Frazier,
Defendant.

No. 75-339 CR(1)

Motion to Suppress Evidence

Now comes the Defendant and moves the Court to suppress as evidence all books, papers, documents, money and other tangible objects in the possession of the government and obtained as a result of an arrest without a search warrant or as a result of the installation of an electronic tracking device on Defendant's automobile and all such evidence obtained as a result of leads supplied by such searches and seizures and arrests, for the following reasons:

1. The said evidence was obtained by means of searches and seizures without any warrant or other lawful authority.

2. The said evidence was not obtained as an incident of a lawful arrest of Defendant but was obtained by means of searches and seizures which followed an unlawful arrest without any warrant or other lawful authority.

3. That the installation of an electronic tracking device on Defendant's automobile constituted a trespass on Defendant's property, an invasion of his right to privacy and was a search

in violation of the Fourth Amendment. See, *U.S. v. Holmes* (5 Cir., 1975), 521 F.2d 859 and *U.S. v. Martyniuk*, (D.C. Oregon, 1975) 395 F. Supp. 42.

4. The arresting and searching officers had ample and adequate opportunity to apply for arrest and search warrants prior to the arrest of Defendant but failed to do so.

By reason of the foregoing, Defendant states that the searches, seizures and arrest were unreasonable and unlawful and in violation of the right to be secure against unreasonable searches and seizures as guaranteed by the provisions of the Fourth Amendment to the Constitution of the United States, and in violation of the rights against self-incrimination and not to be deprived of liberty or property without due process of law as guaranteed by the provisions of the Fifth Amendment to the Constitution of the United States.

LEONARD J. FRANKEL
Attorney for Defendant
8019 Forsyth
Clayton, Missouri 63105
725-8019

Copy of the foregoing Motion
mailed this .... day of .....,
1976, to United States Attorney,
1114 Market Street, St. Louis,
Missouri 63101.